

## **OAG 16-001**

March 15, 2016

*Subject:* Whether a Governor has the power, under KRS 63.080, to remove a duly appointed member of the Kentucky Horse Park Commission during his or her set term, as fixed by KRS 148.060.

*Requested by:* Gregory D. Stumbo, Speaker of the House of Representatives

*Written by:* Mitchel T. Denham, Assistant Deputy Attorney General

*Syllabus:* KRS 63.080 does not provide a Governor with the power to remove a duly appointed member of the Kentucky Horse Park Commission or other boards and authorities with set or defined terms. A Governor must wait until the term set forth under KRS 148.260 ends before he may replace a member.

*Statutes construed:* KRS 63.080(1); KRS 148.260

### ***Opinion of the Attorney General***

Gregory D. Stumbo, Speaker of the Kentucky House of Representatives, has requested an opinion of this office on whether the Governor, under KRS 63.080, has the power to remove a duly appointed member of the Kentucky Horse Park Commission (hereafter "Commission") during his or her four year fixed term. The Speaker indicates that the operative word "shall" in KRS 148.260 does not

permit the Governor to remove these appointees during their set terms. The Governor's Office, in response to our request for its comments, argues that the Governor may remove Commission members "with or without cause, or with or without a reason pursuant to KRS 63.080(1)." The interpretation argued by the Governor's Office would have broader implications than the question at hand, and would allow a Governor to remove – with limited exceptions – nearly any board or commission appointee, at any time, and for any or no reason. Under this reasoning, a new Governor could, for example, void hundreds of appointments midterm and appoint entirely new people to numerous boards and authorities.

After careful consideration, we find that KRS 63.080 does not provide a Governor with the power to remove a duly appointed member of the Kentucky Horse Park Commission during his or her term. Instead, a Governor must wait until the term set forth under KRS 148.260 ends before he may replace the member. Any other interpretation would nullify the codified meaning of the term "shall" under Kentucky statutes, would negate the legislature's explicit creation of "terms" for appointees, would defeat the legislature's intentional creation of autonomous boards or commissions, and would allow a Governor to remove all necessary governing experience in areas the legislature removed from his direct purview.

## BACKGROUND

As discussed further below, the Kentucky Horse Park Commission is an autonomous state agency, separate and apart from the Governor's Executive Cabinet. The Commission has the sole authority for the management, direction, and operation of the Kentucky Horse Park, as well as representing the diverse interests of the Kentucky horse Industry. KRS 148.258 *et. seq.* It is comprised of seventeen (17) members, fifteen (15) of whom are appointed by the Governor pursuant to KRS 148.260(2). The terms of the members are mandated by explicit statute, which states "[t]he appointed members of the commission ***shall hold*** their offices for a term of four (4) years...." KRS 148.260(3)(Emphasis added). Thus, once appointed, a member of Commission holds his or her office for a period of four years.

The Governor's Office argues KRS 63.080 gives the Governor the authority to remove members of the Horse Park Commission regardless of whether or not that person has completed his or her four year term. Such an interpretation is contrary to law.

## ANALYSIS

"The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *Jefferson County Board of Education v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012)(quoting *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009). This fundamental principle was codified in KRS 446.080(1): "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." To achieve this, courts first look to the plain and common meaning of the particular words used in the statutes. *Fell*, 391 S.W.3d at 719. This principle was also codified in KRS 446.080(4). The particular word, sentence or subsection ... must also be viewed in context with other parts of the statute and in light of the whole act. *Petitioner F. v. Brown*, 306 S.W.3d 80, 85-86 (Ky. 2010).

"We presume that the General Assembly intended for the statute to be construed as a whole, for all of its part to have meaning, and for it to harmonize with related statutes.... We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one.... Only if the statute is ambiguous or otherwise frustrates a plain reading, do courts resort to extrinsic aids such as legislative history; the canons of construction; or ... interpretations by other courts."

*Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

In applying these longstanding rules of statutory construction to KRS 63.080(1), we first look at the plain meaning of the words in the statute. KRS 63.080(1) states:

"Except as provided in subsection (2) of this section *and otherwise provided by law*, any person appointed by the Governor, either with or without the advice and consent of the Senate, may be re-

moved from office by the Governor for any cause the Governor deems sufficient, by an order of the Governor entered in the executive journal removing the officer.”

(Emphasis added). The language shows that there are two exceptions to a Governor’s removal authority of gubernatorial appointees. The first exception found in subsection (2), which is not relevant to this analysis, only permits the Governor to remove members of certain University and education related boards for cause. The second exception – “[e]xcept as ... otherwise provided by law” – is a broader, catch all exemption which incorporates other laws passed by the General Assembly.

The language in the second exception is clear and unambiguous. It provides for other laws of the Commonwealth to limit the removal authority. In short, the Governor’s removal authority is limited by other statutes.

This analysis also requires us to apply the statutory construction rules to KRS 148.260(3). In doing so, the meaning of the words “shall hold their offices for a term of four (4) years” is clear. In *Vandertoll v. Commonwealth*, 110 S.W.3d 789 (Ky. 2003), the Kentucky Supreme Court specifically interpreted the word “shall” in the context of statutory interpretation, holding:

“In common or ordinary parlance, and in its ordinary signification, the term shall is a word of command and ... must be given compulsory meaning. If the words of the statute are plain and unambiguous, the statute must be applied to those terms without resort to any construction or interpretation. *Shall means shall.*”

*Id.*, at 795-796 (Internal citations omitted) (Emphasis added). The General Assembly codified this compulsory meaning of the word “shall” under KRS 446.010, stating for purposes of Kentucky statutes, “[s]hall is mandatory.” KRS 446.010(39).

Therefore, per the Kentucky Supreme Court’s guiding precedence interpreting the word “shall,” as well as its prescribed meaning under state statute, the legislature intended, that, once appointed, a member of the Commission serve a “mandatory” four year term and therefore cannot be removed at a Gov-

ernor's pleasure under KRS 63.080. Allowing such removal would not only render the KRS 148.260's use of "shall" meaningless, it would render any concept of terms for Commission members meaningless as all members would merely serve at the Governor's pleasure.

The other statutes discussing the Commission support this interpretation. First, they make clear that the legislature intended the Commission to be a robust administrative body – independent of the Governor or the Governor's Executive Cabinet. KRS 148.260(1) creates the Horse Park Commission as a "separate administrative body of state government." The Commission has the authority to appoint an executive director, who serves at the pleasure of the Commission, and not the Governor or his Executive Cabinet. KRS 148.270. The Commission and the executive director – and not the Governor or his Executive Cabinet – have the exclusive right to hire Horse Park employees and fix their compensation. KRS 148.285. The Commission – and not the Governor or his Executive Cabinet – hold title to all Horse Park buildings, and only the Commission can erect and repair building into the Horse Park or take, acquire, or hold property. KRS 148.280(1)-(2). The Commission further has the broad powers to formulate policies and promulgate rules for the Horse Park. KRS 148.290. It also has the statutory right to enter into contracts on the Horse Park's behalf. KRS 148.280.

In short, the statutory scheme governing the Kentucky Horse Park creates – in virtually every legal way – an independent agency with an independent governing board that is intended to be outside the normal operation and influence of the Executive Cabinet and the Governor, with the exception of his appointing power of Commissioners for mandatory four year terms.

The Governor's Office's interpretation of KRS 63.080 would allow a Governor to directly control each and every aspect of the Kentucky Horse Park by simply removing any Commission member that disagreed with that Governor's or his Executive Cabinet's opinions or decisions concerning the Park. Such an interpretation cannot succeed as it frustrates the intent not only of KRS 148.260, but each and every other statute regarding the Kentucky Horse Park's structure, operations, and even legal status. It would effectively place the Kentucky Horse Park under the direct control of the Governor or the Governor's Cabinet, something the statutes explicitly remove it from.

The Governor's Office relies on the 1934 case of *Johnson v. Laffoon*, 257 Ky. 156, 77 S.W.2d 345 (Ky.App. 1934) to support its argument. In that case, the Court of Appeals found that Governor Ruby Laffoon's removal of Ben Johnson as road commissioner permissible under KRS 63.080.<sup>1</sup> *Id.* There is a major distinction, however, between the question presented to us by Speaker Stumbo and the *Laffoon* case. In 1934, KRS 63.080 contained significantly different language than it does today. At the time it stated that any person appointed by the Governor may be removed by the Governor "*during the term for which he was appointed*" for any cause the Governor deemed sufficient. *Id.*, at 346. The statute was amended in 1948 and the language regarding removal during an appointee's term was deleted from the statute. (1948 Ky. Acts Ch. 25). Therefore, that case construed a statute that has been amended and is significantly different.<sup>2</sup>

If the current KRS 63.080(1) were read as the Governor's Office argues, it would leave the four year term required by KRS 148.260(3) as well as virtually every other term of years established for any board or commission meaningless. Indeed, as explained above, it would effectively remove the independence or autonomy of the numerous boards or commissions the legislature has created, often times for the specific purpose of removing them from the direct control of the Governor. This construction would leave the set terms of the Horse Park Commission and other boards meaningless and would lead to an absurd result. See *Shawnee Telecom*, 354 S.W.3d, at 551. This reading would violate the longstanding rules of statutory construction discussed herein.

Instead, the statutes should be read together and harmonized if possible. *Id.* See *Econ. Optical Co. v. Kentucky Board of Optometric Examiners*, 310 S.W.2d 783, 784 (Ky. 1958). As discussed above, KRS 63.080(1) provides that other laws limit the removal authority of the Governor. KRS 148.206(3) does just that. It "otherwise provide[s] by law" a set term for which an appointee "*shall* hold

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<sup>1</sup> *Laffoon* dealt with an appointment that required consent and approval by the Senate. 77 S.W.2d at 346. There are indications that KRS 63.080 and its prior iterations were meant to address only appointments that receive such consent. *Id.* For purposes of this opinion, we do not address this question.

<sup>2</sup> The Governor's Office also cites to a 1995 letter written by the Attorney General's Office to a former Secretary of the Governor's Cabinet regarding removal of the members of the Real Estate Appraisals Board. That non-binding letter interpreted *Laffoon* to permit removal, but it failed to recognize the significant change in the statute. Moreover, it did not have the benefit of the clear interpretation of the term "shall" as later interpreted by the Kentucky Supreme Court. See *Vandertoll v. Commonwealth*, 110 S.W.3d, at 795-796.

their office.” Thus, the statutes do not conflict. The Governor cannot impede on this set term, which is provided by law, but must wait for a term to expire to appoint a new member.

This reading also keeps intact a Governor’s authority to remove certain officers under KRS 68.010(1). One such example is found in KRS 148.260 itself, which states the governor “*may*” establish an advisory committee for the Kentucky Horse Park. KRS 148.260(8). Because there is no set term or no other restrictions related to that portion of the statute, a Governor may remove any person he appoints to that advisory board under KRS 68.010(1).<sup>3</sup> In addition, members of his executive cabinet serve at his pleasure and can be removed by him at any time. KRS 12.255. Certain members of the Prosecutor’s Advisory Council are appointed by the Governor and do not have a set term. They serve at his pleasure and may be removed at any time. KRS 15.705. Thus, this reading gives effect to all the language in the statute. KRS 68.010 is necessary for these statutes as it clarifies that such appointees can be removed with or without cause.

We are not alone in reaching this result. In the recent case of *Arneson v. Wolf*, the Pennsylvania Supreme Court reviewed a similar question related to its Office of Open Records (ORR), an independent agency in Pennsylvania. 124 A.3d 1225 (Pa. 2015). In that case, out-going Governor Tom Corbett appointed Arneson as the Executive Director of OOR for a six year term. *Id.* The new Governor, Thomas Wolf, terminated that employment on his first day in office. *Id.* Using its precedent and longstanding rules of statutory construction, that court found the termination illegal. *Id.*, at 1228. It held that the ORR was a unique administrative agency needed autonomy from the “coercive influence of a Governor.” *Id.*

The Commission is a unique and important independent administrative agency. It needs its experienced and well qualified board members to carry out its statutory responsibilities. By providing for fixed terms, the legislature has limited the Governor’s removal authority of members of the commission and other boards with set terms.

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<sup>3</sup> The existence of this separate advisory committee, which the Governor may replace at any time, is further evidence that by setting a specific term for Commission members, the legislature did not intend to give a Governor blanket removal powers.

## CONCLUSION

In summary, we find that KRS 63.080 does not provide the Governor with the power to remove a duly appointed member of the Kentucky Horse Park Commission, or other boards and authorities with defined or set terms, during the appointee's term. Instead, the Governor must wait until the term set forth under KRS 148.260 ends before he may replace the member.

ANDY BESHEAR  
ATTORNEY GENERAL

Mitchel T. Denham  
Assistant Attorney General